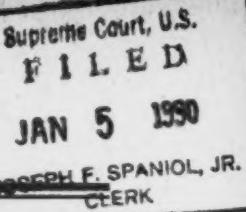


No. 89-696



In the Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF NEVADA, PETITIONER

v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the federal statute requiring States to adopt a maximum speed limit as a condition for receipt of federal highway funds is constitutional.



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 884 F.2d 445 (9th Cir. 1989). The order of the district court (Pet. App. 43a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered August 31, 1989. The petition for certiorari was filed October 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In response to the Arab oil embargo of 1973, Congress enacted the Emergency Highway Energy Conservation Act, Pub L. No. 93-239, 87 Stat. 1046, which precluded the Secretary of Transportation from approving federal funding for highway projects in States that have a maximum speed limit in excess of 55 miles per hour. S. Rep. No. 1111, 93d Cong., 2d Sess. 17 (1974). Although the primary purpose of the Act was to promote energy conservation, Congress also believed that the lower speed limit would produce safety benefits in the form of reduced accident fatalities and injuries. See 119 Cong. Rec. 39,257 (1973) (Rep. Blatnick); *id.* at 39,258 (Rep. Cleveland); *id.* at 41,646 (Sen. Stafford).

One year thereafter, Congress enacted the Federal-Aid Highway Amendments of 1974, Pub. L. No. 93-643, 88 Stat. 2281, now codified at 23 U.S.C. 154(a), making permanent the condition that “[t]he Secretary of Transportation shall not approve any [federal-aid highway] project * * * in any State which has * * * a maximum speed limit on any public highway within its jurisdiction in excess of fifty-five miles per hour.”¹ In enacting this provision, Congress emphasized again both the energy conservation and safety benefits of the law. See H.R. Rep. No. 1567, 93d Cong., 2d Sess. 9-10 (1974).²

¹ Under the federal highway program, a state highway department submits plans for each proposed project, which the Secretary must approve before committing federal funds to support the project. 23 U.S.C. 106.

² See also 120 Cong. Rec. 30,820 (1974) (Sen. Stafford); *id.* at 30,821 (Sen. Randolph); *id.* at 30,861 (Sen. Montoya); *id.* at 40,151 (Rep. Blatnick); *id.* at 40,155 (Rep. Wright); *id.* at 40,157 (Rep. Clausen); *id.* at 40,683 (Sen. Randolph);

2. In 1985, the Nevada legislature enacted legislation authorizing the Nevada Department of Transportation to establish speed limits up to 70 mph on highways and roads within the State. Nev. Rev. Stat. § 484.369 (1967); Pet. App. 62a-63a. The higher speed limits were to go into effect on July 1, 1986, but were to expire if federal funds were withheld as a result. Pet. App. 45a, 62a.

On July 1, 1986, the Nevada Department of Transportation established a speed limit of 70 mph on a 3-mile section of Interstate 80. Pet. App. 45a-46a. The Federal Highway Administration immediately informed the State that it was withholding approval of federal funds for a designated highway project that had previously been submitted for approval, and that it would be unable to approve funds for other projects until the State resumed compliance with federal law. The Nevada statute then expired by its own terms, and the 55 mph speed limit was restored. Pet. App. 46a.

3. On the same day, the State filed this action, alleging that 23 U.S.C. 154 was unconstitutional and seeking injunctive and declaratory relief against its enforcement. The district court dismissed the complaint, holding that conditioning the grant of federal highway funds on adherence to a federal speed limit was a valid exercise of Congress's spending power, Art. I, § 8, Cl. 1, and did not infringe on powers reserved to the States by the Tenth Amendment. Pet. App. 43a-54a.

On April 2, 1987, while the case was on appeal, Congress amended the statute to permit the States to raise the maximum speed limit on certain rural

id. at 40,908 (Rep. Cleveland); *id.* at 40,909 (Rep. Kluczynski); *id.* at 40,912 (Rep. Wright).

highways in the Interstate system to 65 mph. Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 174, 101 Stat. 218, amending 23 U.S.C. 154.³ The court of appeals held that this amendment did not moot the case, accepting the State's position that the revised 55/65 mph limit would still conflict with the 70 mph state limit. Pet. App. 36a-37a n.1.⁴

a. In the court of appeals, the State's principal argument was that the funding condition constituted "coercion," because the highway funds to be withheld from any State with a speed limit violating the condition would constitute up to 95% of the cost of highway projects.⁵ The court of appeals, however, found it unnecessary to determine whether the funding condition was coercive.⁶ Pet. App. 13a-18a. In

³ Congress subsequently allowed States in some circumstances to impose a 65 mph limit on certain rural, non-Interstate highways. 23 U.S.C. 154 note (Supp. V 1987).

⁴ Paragraph 3 of the state statute provides for establishment of a speed limit of up to 70 mph "[u]nless a national maximum speed limit is set by the Federal Government at a speed greater than 60 miles per hour." Nev. Rev. Stat. § 484.369; Pet. App. 63a. Since the 65 mph limit applies only to certain rural highways, the Federal Government has not established a "national maximum speed limit" that is "greater than 60 miles per hour." Therefore, while the new 65 mph limit reduces the practical importance of the dispute, we agree with the State that the case is not moot.

⁵ Under 23 U.S.C. 120, the federal share of approved highway projects generally may not exceed 95% of the total cost of the project.

⁶ The court observed that the "elusive[]" coercion test has been "infrequently applied in federal case law, and never in

stead, the court found that the purposes of the coercion inquiry are adequately served if the funding condition could itself have been enacted as a direct regulation. In the court's words, "if the congressional action passes muster under the Commerce Clause (or some other non-Spending power), and the restraints of the Tenth Amendment, * * * there can be no reason to fear that the federal government is unconstitutionally intruding into areas of uniquely state concern." Pet. App. 21a. If Congress could achieve a national maximum speed limit under the Commerce Clause, "it may also achieve that result through the more gentle commands of the Spending Power." Pet. App. 18a.

b. The court of appeals concluded that the federal government has ample authority to establish a national speed limit under the Commerce Clause. Noting that Nevada's attempt to create a 70 mph speed limit covered only a portion of I-80, which is part of the Interstate highway system (Pet. App. 40a n.13), the court pointed out that "the interstate highways, and the feeder roads that serve them, are the arteries of national commerce" (Pet. App. 23a-24a), and that a federal speed limit is rationally related to pre-

favor of the challenging party," Pet. App. 15a (citing *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981)). Moreover, the court noted that the determination as to whether the threatened withholding of federal highway funds would be coercive raises a series of "unanswered questions," such as whether the relevant inquiry is into the percentage of programmatic funds lost, the percentage of the federal share that is withheld, the proportion of the State's income that would be required to replace the lost funds, the availability of alternative funding, or the State's general willingness to impose taxes comparable to those imposed by other States. Pet. App. 15a-16a.

serving safety on these roads and conserving fuel. Pet. App. 23a-28a.

c. Turning to the question whether congressional action pursuant to the Commerce Clause to establish a federal speed limit would violate the Tenth Amendment, the court relied on *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), to conclude that “absent any ‘extraordinary defect’ in the national political process, Nevada’s forum for raising a claim of infringed sovereignty lies with the legislature, not the judiciary.” Pet. App. 30a (quoting *South Carolina v. Baker*, 485 U.S. 505, 512 (1988)). No such “extraordinary defect” was claimed here. Pet. App. 30a.

Even leaving *Garcia* aside, the court of appeals concluded that a national speed limit on interstate roads would not infringe any integral state function, since “the control of roads and highways has not traditionally fallen under plenary state control but under the cooperative agreement of state, local, and federal officials.” Pet. App. 31a-32a. Nor did the court accept petitioner’s contention that a national speed limit would “commandeer” the State’s regulatory power, see *FERC v. Mississippi*, 456 U.S. 742 (1982). As the court explained:

[T]he national speed limit requires the state police to enforce a standard only marginally different from the ordinary state rule. The state regulatory machinery is not diverted from its regular duties but continues to enforce the identical type of rule it has traditionally implemented. That the specific speed limit it now enforces results indirectly from a federal statute instead of exclusively from a state statute has little or nothing to do with the nature of the function performed by the state officers.

Pet. App. 34a-35a. See also *South Carolina v. Baker*, 485 U.S. at 513-515. Thus, the court of appeals held that because enactment of a national speed limit would be well within the power of Congress, the funding condition at issue here is also a valid exercise of congressional power.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. In *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court upheld a federal statute that withheld a portion of a State's federal highway funds if the State did not adopt a minimum drinking age of twenty-one. Holding that the statute was constitutional, the Court articulated four limitations on the spending power. The federal speed limit is well within these limitations.

First, the Court stated that "the exercise of the spending power must be in pursuit of 'the general welfare.'" 483 U.S. at 207. In determining whether an exercise of the spending power is in the "general welfare," courts must "defer substantially" to the judgment of Congress. *Ibid.* The 55 mph funding condition plainly complies with this restriction, since it was enacted in response to national concerns about energy conservation and highway safety. See S. Rep. No. 1111, 93d Cong., 2d Sess. 17 (1974); H.R. Rep. No. 1567, 93d Cong., 2d Sess. 9-10 (1974).⁷

⁷ In light of the "substantial deference" due to Congress' determination of what is in the "general welfare," the Court has "questioned whether 'general welfare' is a judicially enforceable restriction at all," *Dole*, 483 U.S. at 207 n.2 (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (*per curiam*)). In this light, the State's claim (Pet. 14-15, 24-25) that the

Second, the Court stated that Congress must condition its grants “‘unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’” *Dole*, 483 U.S. at 207 (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). This limitation is not at issue in this case.

Third, the Court read prior cases to “suggest[] (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion))). In this case, as in *Dole*, “the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel.” 483 U.S. at 208. Encouraging lower speed limits on the highways is also directly related to the federal interest in conserving energy.

Finally, the Court stated that “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.” *Dole*, 483 U.S. at 208. However, that means only that the Spending Power “may not be used to induce the States to engage in activities that would themselves be unconsti-

current speed limits of 65 mph in some rural areas and 55 mph in more populated areas do not serve interests of safety and economy—and thus do not serve the “general welfare”—is untenable. Certainly, the fact that Congress has decided that a 65 mph limit is reasonably safe and economical on some rural highways does not give license to the courts to second-guess its simultaneous decision that the same speed limit in more populated areas would be both unsafe and uneconomical—and would therefore disserve the “general welfare.”

tutional." *Id.* at 210. Here, as in *Dole*, if the State were "to succumb to the blandishments offered by Congress * * *, the State's action in so doing would not violate the constitutional rights of anyone." *Id.* at 211.

2. The Court in *Dole* also canvassed the possibility that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). Petitioner argues that there is coercion here because if it refuses to comply with the prescribed maximum speed limit, it will lose all its federal highway funds. By contrast, petitioner points out that only 5% of the federal highway funds otherwise obtainable by the State were at issue in *Dole*.

As the court of appeals properly determined, however, the purpose of any coercion limitation on the spending power is not implicated if Congress could directly mandate the conduct it seeks to encourage by use of its spending power. The obvious purpose of the coercion limitation is to place some restriction on the use of federal funding conditions to achieve goals beyond the power of Congress to achieve by direct regulation. See *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980) (opinion of Burger, C.J.). This purpose has no relevance where Congress could constitutionally impose its will by some means other than the spending power. Thus, as the court of appeals correctly concluded, if direct regulation is allowable, then the threat to withhold funds, which is at most "a lesser form of coercion," must also be valid. Pet. App. 20a.⁸

⁸ In other cases, funding conditions challenged under the Tenth Amendment have been sustained despite the fact that

The two decisions of this Court relied upon by petitioner both involved attempts to achieve results that may well have been beyond Congress's power to achieve directly. In *Dole*, the Court assumed *arguendo* that the Twenty-First Amendment placed the imposition of a national minimum drinking age beyond the regulatory authority of Congress. 483 U.S. at 206. And in *United States v. Butler*, 297 U.S. 1 (1936), the only case striking down a federal funding condition, the parties agreed that the legislative scheme at issue was beyond the direct regulatory power of Congress. *Id.* at 63-64. The *Butler* Court itself phrased the coercion issue as whether a federal statute may "purchase a compliance which the Congress is powerless to command." *Id.* at 70 (emphasis added).

In this case, in contrast, it is clear that Congress has substantial power under the Commerce Clause to regulate safety and fuel economy on interstate highways. See *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). Indeed, such regulation falls well within the traditional federal interest in safe use of the channels of interstate com-

noncompliance would entail loss of *all* federal funds under the program involved. *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (3-judge court), aff'd, 435 U.S. 962 (1978) (loss of all funding under more than 40 federal health assistance programs); *Alabama v. Lyng*, 811 F.2d 567 (11th Cir.), cert. denied, 484 U.S. 821 (1987) (loss of all food stamp funds); *Oklahoma v. Schweiker*, 655 F.2d 401, 413 (D.C. Cir. 1981) (loss of all Medicaid funds). See also Pet. App. 15a-17a (discussing various factors, aside from percentage of federal grant tied to the condition, that might be thought relevant to any coercion inquiry).

merce. See 49 U.S.C. App. 2505 (Supp. IV 1986) and 49 U.S.C. 3102 (federal regulation of commercial motor vehicle safety); 45 U.S.C. 421 *et seq.* (federal regulation of railroad safety); 49 U.S.C. App. 1421 *et seq.* (federal regulation of aviation safety). Therefore, because Congress could act directly to achieve what it seeks indirectly to encourage through the use of the spending power at issue in this case, the inquiry into whether the funding condition at issue here is coercive is unnecessary.

3. Petitioner's request (Pet. 17) that the Court apply the reasoning of *National League of Cities v. Usery*, 426 U.S. 833 (1976), to this case in effect asks the Court to re-examine its decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), in which *National League of Cities* was overruled. See also *South Carolina v. Baker*, 485 U.S. 505, 512-513 (1988). As the court of appeals recognized (Pet. App. 31a-32a), however, control of highways has traditionally been a cooperative effort of federal, state, and local authorities. Consequently, there is no reason to believe that the result in this case would be any different under the "traditional governmental functions" test of *National League of Cities*.⁹

⁹ Petitioner cites two sources in support of its contention that regulation of highways is a "traditional State function." Its reliance on both is misplaced. Far from recognizing an exclusive state power over maximum rates of speed, the statute petitioner cites—23 U.S.C. 145—simply expresses Congress's decision to permit the States to determine which highway projects shall be federally funded. The statute thus emphasizes precisely the cooperative federal and state control over the highways on which the court of appeals relied; it is entirely consistent with Congress's determination in 23 U.S.C. 154 that federal funding would be available to a State only if

CONCLUSION

The petition of a writ ~~of~~^{for} certiorari should be denied.

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JANUARY 1990

it conformed to the 55/65 mph speed limits. See Pet. 11-12. Nor do the cases cited by petitioner (Pet. 12-13) that have adverted to the power of the States to regulate their own highways support petitioner's contention that States have exclusive constitutional power over their highways. Both cases cited by petitioner, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523 (1959), and *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 (1978), struck down state highway regulations under the dormant Commerce Clause. They thus necessarily establish that there is a substantial federal interest—exercisable by Congress if it chooses to do so—in regulation of the nation's highways. See Pet. App. 24a.

